# Supreme Court of the United States

**October Term 1945**

No. 788

MAURICE D. ADAMS, SYLVIA JACOBS, MARTIN LASHER, PEARL LASHER, E. FRANK O'HARA, SAMUEL BLOOM, ABRAHAM LINDNER, ELLA LINDNER, SUNNE MILLER, GENIA BERK, CHARLES GILBERT, DOROTHY LEE, HARVEY LEE, HOWARD N. STACK and MAX W. WINN,

*Petitioners,*

*against*

UNITED STATES DISTRIBUTING CORPORATION, THE PITTSTON COMPANY, *et als.*,

*Respondents.*

## BRIEF OF RESPONDENT THE PITTSTON COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

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# INDEX



## TABLE OF CASES

## Statutes Cited



## Texts

### *The Opinions Below*

The Law and Equity Court of the City of Richmond did not write an opinion. The opinion of the Supreme Court of Appeals of Virginia has been reported at 184 Va. 134, 34 S. E. (2d) 244.

### *Preliminary Statement*

This brief is submitted by respondent, The Pittston Company, hereinafter called "Pittston," in opposition to the petition for a writ of certiorari to the Supreme Court of Appeals of Virginia of Maurice D. Adams and other preferred stockholders of United States Distributing Corporation, hereinafter called "Distributing," who dissented to a merger of Distributing and Pittston.

The basis of the Bill of Complaint, filed by petitioners in the state court, is that they are entitled to a money decree in an amount equal to the par value of their stock,[1] plus accrued dividends ($184 per share) (R. 72-84). This claim is founded on the language in the stock certificates which provides that in case of liquidation or dissolution, the assets of the corporation shall first be applied toward paying holders of the preferred stock an amount equal to par plus accrued dividends (R. 74).

The Supreme Court of Appeals of Virginia dismissed the Bill of Complaint and held that under the appraisal statute, Section 3822a (formerly part of Section 3822) of the Virginia Code, petitioners were limited to a proceeding thereunder to secure the fair cash value of their stock.

Petitioners seek certiorari on the ground that the remedy under the Virginia appraisal statute, until it was amended in 1922, was not exclusive, but gave petitioners

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[1] United States Distributing Corporation 7% cumulative convertible preferred stock of a par value of $100 per share.

the right to enforce their contractual rights to recover par plus accrued dividends in the event of a dissolution, that the 1922 amendment, which made appraisal the exclusive remedy, destroyed "the obligation of the contract whereby petitioners were entitled to demand and receive out of the assets of their corporation—upon its liquidation or dissolution or distribution of its assets—the par value of their preferred stock plus accrued cumulative dividends thereon;", and that therefore the statute is repugnant to Article 1, Section 10 of the Constitution of the United States (Pet. 23).

Thus, petitioners now contend that the amendment to the appraisal statute in 1922, which made appraisal the exclusive remedy, destroyed their pre-existing contractual rights. That is the whole basis for the petition. That is the sole ground on which their constitutional argument rests. But the record does not show when the preferred stock was issued. Nowhere in the record is there a suggestion that any asserted contractual rights of the petitioners existed prior to the 1922 amendment of the appraisal statute.[2] Thus the whole basis for their petition

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[2] Since petitioners' present position is now taken for the first time, respondent feels that it should advise this Court that the preferred stock was not in fact authorized or issued until after 1922.

Although Distributing was chartered in 1919, it issued no preferred stock prior to 1924. Moody's Rating Books, Industrial Investments, 1923, at page 1437.

The first issue of preferred stock was in January, 1924. Moody's Analyses of Investments, Industrial Securities, 1924, at page 1614.

Petitioners' preferred stock was issued in 1927, when one share of old preferred stock was exchanged for 1.6 of new preferred and 6 shares of old common, and one share of old common was exchanged for 4/10 of a share of new preferred and 1-1/2 shares of new common. Moody's Manual of Investments, Industrials, 1927, at page 2658.

falls. For this reason and others hereinafter enumerated no question is raised which requires or deserves review by this Court.

### *Summary of the Argument*

POINT I. The federal question sought to be reviewed was not properly raised in the Virginia courts.

POINT II. The case does not present a substantial federal question.

POINT III. The decision of the Supreme Court of Appeals of Virginia rests upon a state ground which independently and adequately supports the decree.

### *Argument*

## POINT I

**The federal question sought to be reviewed was not properly raised in the Virginia courts.**

Where, as in the instant case, a state court does not pass on the federal question sought to be reviewed, it must affirmatively appear that the question was advanced in the state court at the earliest opportunity.

> Robertson and Kirkham, "Jurisdiction of the Supreme Court of the United States," Sec. 60 p. 107, Sec. 73 p. 124 [1936 Ed.].

Petitioners' assertion that the appraisal statute would be unconstitutional, if construed to provide for appraisal as the exclusive remedy, was first made in summary fashion in their brief in support of their petition to the Supreme

Court of Appeals of Virginia (R. 62-63; Pet. 5). No reference was made to the United States Constitution, and since the Virginia Constitution,[3] like that of the United States, provides that no law shall be passed "impairing the obligation of contracts," petitioners' assertion of unconstitutionality is deemed to refer solely to the Constitution of Virginia.

*Bowe* v. *Scott*, 233 U. S. 658, 664, 665; 34 S. Ct. 769; 58 L. Ed. 1141 (1914).

In *Gibbes* v. *Zimmerman*, 290 U. S. 326, 328; 54 S. Ct. 140; 78 L. Ed. 342 (1933) this Court said:

> ". . . The appellant, who was plaintiff in the suit, asserts that the Act impairs the obligation of contract, in violation of the Constitution of the United States. We cannot consider this contention, since in his pleading the appellant relied solely on the provisions of the state constitution with respect to the obligation of contracts, and made no reference to §10, of Article 1 of the Federal Constitution; and the Supreme Court, in disposing of the case, did not mention or discuss that section."

Prior to filing their application for rehearing petitioners did not raise the federal question sought to be reviewed with sufficient particularity and definiteness, and fall far short of the "Clear Intendment Rule" enunciated in *Bryant* v. *Zimmerman*, 278 U. S. 63; 49 S. Ct. 61; 73 L. Ed. 184 (1928), upon which they rely (Pet. 7).

The federal question was first raised with sufficient definiteness in the petition for rehearing (R. 131, 136, 143-145; Pet. 6-7). It is a well established rule of this Court

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[3] Article IV, Sec. 58 of the Constitution of Virginia.

that federal questions first presented in a petition for rehearing are not timely unless the state court entertains the petition and expressly passes on them.

*Hernon* v. *Georgia*, 295 U. S. 441, 443; 55 S. Ct. 794; 79 L. Ed. 1530 (1935).
*Godchaux Co.* v. *Estopinal*, 251 U. S. 179; 40 S. Ct. 116; 64 L. Ed. 213 (1919).

Since the federal question was not brought into the case by the decision of the Supreme Court of Virginia, and since that decision could reasonably have been anticipated by petitioners, and since they had every opportunity to raise the federal question in the lower court, they may not rely on the "Surprise Cases" (Pet. 7).

## POINT II

**The case does not present a substantial federal question.**

As appears in The Preliminary Statement (*supra*, p. 3), there is nothing in the record even to suggest that petitioners had any contractual rights which could have been impaired by the 1922 amendment to the appraisal statute. Thus there is no basis for petitioners' claim that that amendment destroyed a contractual obligation to them embodied in the Distributing charter.

Even under the statute before it was amended petitioners could not obtain what they seek, a money decree for the par value of their stock plus accrued dividends ($184 per share). *Winfree* v. *Riverside*, 113 Va. 717, 75 S. E. 309 (1912), was the only case which considered the

Virginia appraisal statute before the 1922 amendment. That case held only that stockholders dissenting from a merger were not limited to the appraisal procedure outlined in the statute, but were permitted to bring suit in an equity court to have the "actual value" of their stock ascertained. It did not suggest that "actual value" meant par plus accrued dividends.

The Supreme Court of Appeals of Virginia correctly held that the merger did not constitute a dissolution of Distributing, that the merger continued the existence of both corporations in the merged corporation, and that therefore the provisions relied upon by petitioners were not made operative. Its conclusions are fully supported by the authorities it cited (R. 126) and by the recent opinion of this Court in *Otis & Co.* v. *Securities and Exchange Commission,* 323 U. S. 624; 89 L. Ed. 460; 65 S. Ct. 483 (1945).

## POINT III

**The decision of the Supreme Court of Appeals of Virginia rests upon a state ground which independently and adequately supports the decree.**

Petitioners claim that they are entitled to a money decree in the amount of par plus accrued dividends because the stock certificates and the amended charter of Distributing provided for such payment upon dissolution. The Supreme Court of Appeals of Virginia held that under its statutes and decisions there was no dissolution of Distributing within the meaning of the provisions of the stock certificates and the amended charter (R. 125-126). The decree is therefore based upon a non-federal ground, adequate to support it. If petitioners had no vested contrac-

tual right to recover par plus accrued dividends, no such contractual right could be impaired by the appraisal statute.

## CONCLUSION

It is respectfully submitted that there is no reason for this Court to review the determination of the Supreme Court of Appeals of Virginia, and that, accordingly, the petition herein should be denied, with costs.

Respectfully submitted,

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